In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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No. 73-1718

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, MOLLY BRONSTEIN, AND ALL OTHER INTERVENORS IN THE DISTRICT COURT,

Appellants,

vs.

UNITED AMERICANS FOR PUBLIC SCHOOLS, A CORPORATION, et al.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

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Jurisdictional Statement

OPINION BELOW

The memorandum opinion of the district court, contained in its order granting plaintiffs' motion for summary judgment (App. A, *infra*), as corrected by a corrective order (App. A, *infra*) is not yet reported.

JURISDICTION

This is a suit to enjoin the Franchise Tax Board from executing the California statute allowing limited income tax credits for prescribed private school educational costs. The statute is attacked as violative of the Establishment Clause of the First Amendment. A three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. Twenty nine parents, each with a child or children in the nonpublic schools of California, were allowed to intervene as defendant-intervenors by order of the district court entered August 29, 1973. The district court granted plaintiffs' motion for summary judgment and a permanent injunction enjoining execution of the statute was entered on February 1, 1974 (App. A, *infra*). Notice of appeal to this Court was filed by intervenors on March 19, 1974 and by the Franchise Tax Board on March 28, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether summary judgment is an appropriate vehicle to decide the constitutionality under the Establishment Clause of a State statute for tax credits for parents of nonpublic school children, when the proponents of summary judgment make no showing of facts as required by FRCP 56(e) but rely only on suppositions, and the opponents controvert the suppositions.

2. Whether summary judgment should be granted in a delicate area of constitutional law, on the face of a statute, because of suppositions about the statute's operative scope, which the opponents of summary judgment claim would be disproved by the actual facts.

3. Whether a court should in effect take judicial notice of suppositions as adjudicative facts to grant summary

judgment, when the opponents of summary judgment maintain that the actual facts are not accordant with the suppositions.

STATUTE INVOLVED

The statute under attack, popularly known as the Tax Credit Law, was enacted December 21, 1972, as Cal. Stats. 1972, c. 1260, and is codified in California Revenue and Taxation Code §§ 17065-17067. The full statute is set forth in App. B, *infra*.

STATEMENT

A. The pleadings

The credits allowed by the Tax Credit Law were to apply in the taxable years beginning after December 31, 1972 (App. B *infra:* misstated in complaint, ¶ 7, as "1971"). The complaint challenging the law as violative of the Establishment and Equal Protection Clauses (¶¶ 18 and 19) was filed January 16, 1973. It was brought by United Americans for Public Schools, Americans United for Separation of Church and State, and four individuals, William F. Poynter, Chester MacPhee, Henry Schindel and Mary Middleton, alleged to be citizens and taxpayers of California and members of one or the other of the corporate plaintiffs. The defendant, now appellant, is the Franchise Tax Board of the State of California, the agency charged with enforcement of the California Revenue and Taxation Code.

The complaint, besides pleading ultimate fact, is largely an admixture of allegations of evidentiary fact with conclusions of law. It may be described as "boilerplate" for attacks on state programs in aid of children attending nonpublic schools or their parents. For example, the complaint alleges that the tax credits provided under the law merely

establish a conduit system by which State funds are conveyed to denominational schools; that such funds will not lose their identity as public funds by reason of the release thereof to the parents; that the primary effect of the law is to foster the State's sponsorship, financial support and active involvement in religious activity with resulting political fragmentation and divisiveness along religious lines (Complaint, ¶¶ 12, 13 and 14).

These allegations were explicitly and completely denied by the Franchise Tax Board (Answer, ¶¶ 12, 13 and 14). The other allegations of the complaint directly material to the constitutional challenges were either similarly denied by the Franchise Tax Board, or that agency pleaded that it was without knowledge or information sufficient to form a belief as to the truth of the allegations, which has the effect of a denial under FRCP 8(b). (Answer, ¶¶ 7, 9, 10, 11, 15, 16, 17, 18, 19 and 20).

Applicants for intervention, all residents and taxpayers of California, are twenty-nine parents each with a child or children in the nonpublic schools of California. They were allowed to intervene as defendants by order of the district court announced at the hearing on motion for summary judgment (Reporters' Tr. pp. 3-5), and entered August 29, 1973. Intervenors' answer specifically put in issue the allegations of ¶ 9 of the complaint, respecting the percentage of children in schools with Catholic affiliation (Intervenors' Ans. ¶ 3)* as had the answer of the Franchise Tax Board, ¶ 9.

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* At the hearing on August 28, 1973, intervenors made a specific offer of proof in this connection. Later data having become available after the hearing, counsel for intervenors on September 5, 1973 by letter to the district court (with copies to all parties) invited attention to the latest data available. This offer of proof and later data will be further referred to in connection with the hearing, *infra*.

The answer of the intervenors, ¶ 4, specifically denied the material allegations of ¶¶ 10 through 19 of the complaint. Thus intervenors denied that the tax credits directly benefit schools with religious affiliation; denied that they merely establish a conduit system; denied that the "funds" resulting from the tax credits will not lose their identity as "public funds;" denied that the reasonable and primary effect of the law is to foster the State's sponsorship, financial support and active involvement in religious activity; denied that the statute results in divisiveness along religious lines; and further denied the conclusory statements of the complaint that were set forth as allegations of fact. As a separate defense intervenors alleged that the law promotes the secular education of California children (Intervenors' Ans., fourth defense).

B. The Tax Credit statute

The statute is set forth in full in App. B, *infra*. It states that under California Education Code sections 17751 and 17801, the minimum amount the State may provide for the support of children in the public schools is $125 for each unit of average daily attendance; that the average combined state and local expenditure for each such unit for 1972-1973 will exceed $900; that likely additional increases are forthcoming. (Sec. 2(b), App. B, *infra*). It provides for income tax credit for the individual taxpayer for education cost (tuition and classroom instruction fees) for those dependents who are in nonpublic schools, grades kindergarten through 12, in compliance with California Education Code sections 12154 and 12154.5. The tax credit must not exceed the *lesser* of (i) the amount of education cost payable to a nonpublic school during the taxable year, or (ii) an amount which decreases with the taxpayer's adjusted

gross income, from a $125 tax credit for a taxpayer with less than $15,000 adjusted gross income, to zero tax credit for one with a $19,000 or over adjusted gross income.

It is important to contrast the actual provisions of the statute with the conclusory allegations of the complaint. Thus ¶ 14 of the complaint alleges: "The reasonable and primary effect of [the statute] is to foster the State's sponsorship, financial support and active involvement in religious activity with resulting political fragmentation and divisiveness along religious lines."

The statute provides: "The Legislature believes that the public interest is best served through competition and diversity in educational opportunity offered by public and nonpublic schools; nonpublic schools complying with state standards as required by law fulfill a public purpose by serving the general welfare of the people of the state." (Sec. 2(f), App. B, *infra*).

C. The motion for summary judgment and the hearing thereon

Plaintiffs' motion for summary judgment came on for hearing on August 28, 1973. The memorandum of points and authorities in support of the motion was limited to citation of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Plaintiffs submitted no affidavits or other evidence in support of the motion, although an affidavit of counsel in support of the motion for a preliminary injunction had been filed (Aff. of Henry C. Clausen, Jr. dated July 3, 1973). That affidavit consists merely of references to various publications and, as hearsay, could not constitute legal evidence in support of the motion for summary judgment. FRCP 56(e) requires that: "Supporting and opposing affidavits [on motion for summary judgment] shall be made on personal knowledge,

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In opposition to the motion for summary judgment the Franchise Tax Board submitted affidavits of executives of schools affiliated with various denominations, and of the executive secretary of the California Association of Independent Schools, compliant with FRCP 56, establishing that the educational costs attributable to secular education, as prescribed by the State Education Code, exceed $125 per pupil per year.

The proceedings on the motion for summary judgment are contained in the reporters transcript for August 28, 1973. During these proceedings applicants for intervention were allowed to intervene as defendants (Rep. Tr. 3-5). Intervenor-defendants offered to prove that only about 45 or 46 percent of the nonpublic schools of California are Catholic-related schools; that the number of children in Catholic-related schools in California does not exceed 69% of all those in nonpublic schools* (Rep. Tr. 13-14, 20); that the Tax Credit Statute has not caused divisiveness along religious lines but on the contrary has engendered good will in a remarkable way (Rep. Tr. 15, 20); that all of the nonpublic schools in California subscribe to the Civil Rights Act (Rep. Tr. 20).

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* On September 5, 1973, counsel for intervenor-defendants wrote a letter to the presiding judge of the three-judge court (with copies to the other judges and counsel), the body of which reads: "Part of the data given by me at the hearing on Tuesday, August 28, 1973 relative to nonpublic schools in California, has now been superseded by new data just made available. It now appears that as of October 1972, the percentage of nonpublic elementary and high schools which are Catholic related has declined to 34%. It further appears that as of October 1972, of the children who are in such nonpublic schools, the percentage in Catholic related schools has declined to 67%."

D. The decision below

In its order granting plaintiffs' motion for summary judgment entered February 1, 1974 (App. A, *infra*, pp. 1-4) the district court included a brief statement of its rationale. The holding is that the Act is violative of the Establishment Clause and that plaintiffs are entitled to summary judgment enjoining its enforcement. The holding apparently is that unconstitutionality is apparent on the face of the statute under the authority of *Committee for Public and Religious Freedom v. Nyquist, supra*. The court's statement includes no references to the denials in the answers of the complaint's essential allegations (set forth in Subsec. A, *supra*), nor to the affidavits presented by the Franchise Tax Board, nor to intervenors' offers of proof.

The district court's opinion was signed by only two of the originally designated three-judge court, Judge William G. East and Judge Stanley A. Weigel. At the end of the order appears the statement: "Before his death, Judge [Oliver D.] Hamlin, Jr. concurred in the result reached in this case." Judge Hamlin died on December 28, 1973.

By a corrective order, also entered February 1, 1974, signed by Judge Stanley A. Weigel, Judge William G. East concurring, the word "only" was changed to "primarily" in the sentence of the original order reading: "The California tax credit benefits only those taxpayers who send their children to sectarian schools." (p. 3, lines 23-24). Similarly the word "Recognizing" was substituted for the words "On the assumption" in the sentence of the original order reading: "On the assumption that the amount of the tax credit will find its way into sectarian schools, defendant and defendant-intervenors contend that the resultant aid to those schools would be used exclusively for secular pur-

poses because the tax credit is wholly insufficient to meet the costs of secular services performed by sectarian schools."*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The grant of summary judgment here misapplied the principles of FRCP 56 and struck down a State statute over the State's and intervenors' insistence that there are genuine issues of material fact. Contrary to the admonition that "[W]e can only dimly perceive the lines of demarcation in [an] extraordinarily sensitive area of constitutional law," *Lemon v. Kurtzman*, 403 U.S. 602, 608 (1971), this use of summary judgment proceeded by way of supposition rather than demonstration. This is not a case where the opponents of summary judgment impermissibly relied on their pleadings and failed to meet a factual showing of the proponents grounded on depositions, admissions, affidavits and the like. To the contrary, here *the proponents attempted no showing*. Their motion for summary judgment was accompanied only by citation to the *Nyquist* case.** The allegations essential to their constitutional theory—for example that the tax credits establish a conduit system by which state funds are conveyed to denominational schools; that the primary effect of the law is to establish State sponsor-

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* All nonpublic schools, those not affiliated as well as those affiliated with denominations, are within the ambit of the California Tax Credit Law. The intervenors represent both types of schools. See Affidavit of Sara Lewis Rugg, Executive Secretary of the California Association of Independent Schools, in opposition to plaintiffs' motion for summary judgment, sworn to August 23, 1973.

** The affidavit of plaintiffs' counsel Henry C. Clausen, Jr. dated July 3, 1973, in support of the motion for a preliminary injunction, consisted merely of references to various publications, was entirely hearsay, and of no legal value in support of the motion for summary judgment. FRCP 56(e).

ship of religious activity; that the law induces divisiveness along religious lines; that the schools are dominated by religious inculcation; and other allegations (see Subsec. A, *supra*)—are controverted by the Franchise Tax Board and intervenors.

Logically, therefore, the district court's grant of summary judgment solely on the basis of the *Nyquist* case must have assumed that case to control all possible versions of the facts that might have been revealed at trial, however serious the dispute of the parties as to those facts. This is a dangerous and invalid use of summary judgment in any context, as this Court has been alert to recognize. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944); *United States v. Diebold*, 369 U.S. 654 (1962); *Adickes v. Kress & Co.*, 398 U.S. 144, 153 (1970). Abuse of summary judgment is especially dangerous when delicate questions of constitutional rights are involved as they are respecting the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause." *Tilton v. Richardson*, 403 U.S. 672, 677 (1971).

Whatever the psychological pressure on three-judge courts for efficiency and expedition, we submit there is no statutory provision or other principle that justifies for them more arbitrariness in use of summary judgment than is tolerated generally for other courts.

The meandering course of aid to nonpublic school children and schools since World War II cautions against disposal of such cases as this by summary judgment on the basis of mere suppositions: *Everson v. Board of Education*, 330 U.S. 1 (1947) (bus transportation allowed); *Board of Education v. Allen*, 392 U.S. 236 (1968) (texts allowed); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (assistance for teachers' salaries disallowed); *Tilton v. Richardson*, 403

U.S. 672 (1971) (college construction aid allowed with protection); *Hunt v. McNair*, 413 U.S. 734 (1973) (financial assistance for projects of religious college allowed).

Nyquist, the sole reliance of the district court, itself recognizes that its holding turns upon the "absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes". 413 U.S. at 780.

All that the Franchise Tax Board and intervenors ask for is their right to have the constitutionality of the statute decided on the actual facts, not on suppositions about the nature of the nonpublic schools and their activities. In California the nonpublic schools must provide substantially the same secular education as the public schools. (Cal. Ed. Code Secs. 12101, 12154). Appellants will show that the tax credits to parents cannot reasonably be connected with anything but the secular education of children, in view of the operation and performance of the California nonpublic schools. Appellants submit that under the evolved criteria for appraising such programs as the instant one, including the criteria of *Kurtzman* and *Nyquist*, the actual facts place this tax credit statute within the narrow channel still recognized as open. The opponents of summary judgment should be allowed the chance to show that the language of *Nyquist* invoked by the court below, "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education" (413 U.S. at 778), is not applicable to the facts here.

Under the New York statute involved in *Nyquist* the amount of the deduction a taxpayer could take for tax credit purposes was not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and bore no relation whatsoever to the cost of educating a pub-

lic school child. (413 U.S. at 765-767, 790). As the Court stated, under the New York scheme "The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition . . ." (413 U.S. at 790). The statute here is directly to the contrary. (Sec. 17066(b), App. B, *infra*). Further, the tax credit allowed by the New York law bore no relation whatsoever to the cost of public education. Under the New York law "[P]arents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition." (413 U.S. at 765).* Contrast the facts and relationships between public and nonpublic education set forth in the California statute. (Sec. 2, App. B *infra*).

From the viewpoint of the intervenors, summary judgment here was a particularly inappropriate vehicle to use in deciding whether, under the facts of nonpublic school life in California, the Establishment Clause precludes California's measure of tax relief. For the intervenors, summary judgment against the Legislature's efforts to accord a measure of tax equity for those who bear conscience's burden of maintaining two school systems, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); cf. *Meyer v. Nebraska*, 262 U.S. 390 (1923), beclouds the "transcendant value of free religious exercise in our constitutional scheme," *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). For them, summary judgment makes idle the high promises of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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* The tax credit parts of the New York statute are to be carefully distinguished from other parts of the statute concerning nonpublic school maintenance, also involved in *Nyquist* but not analogous here. Those other parts did establish a relationship between costs for public and nonpublic schools, 413 U.S. at 763. Those parts were struck down as direct subsidies to sectarian schools, a problem not involved here, 413 U.S. at 774.

From the viewpoint of the State, the summary judgment was harshly restrictive of its right to stand on its denials, put the plaintiffs to their proof, and have the case decided on the actual facts. It denied the State the opportunity to show where on the labyrinthian line that is the Establishment Clause, *Walz v. Tax Commission*, 397 U.S. 664, 668-70 (1970), the true facts place this case.

Admittedly the channel left open by *Nyquist* between Scylla (avoidance of excessive entanglement) and Charybdis (assurance against State promotion of religion), is a narrow one. But the more complicated the judicial task, the greater the need for a procedure that truly "hears before it condemns." *Hovey v. Elliot*, 167 U.S. 409 (1897).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.*

Respectfully submitted,

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* In view of the death of one of the judges of the three-judge court during the pendency of the case, the Honorable Oliver D. Hamlin, Jr., counsel must call the attention of this Court to *Ayrshire Corp. v. United States*, 331 U.S. 132 (1947), holding that a judgment of a three-judge court based upon a determination by only two judges is void.

Appendix A

In the United States District Court
for the Northern District of California

No. C-73-0090 SAW

United Americans for Public Schools, a corporation, Americans United for Separation of Church and State, a corporation, William F. Poynter, Chester Mac Phee, Henry Schindel, Mary Middleton,

Plaintiffs,

v.

Franchise Tax Board of the State of California,

Defendant,

Molly Bronstein, Sam Bronstein, Mark Chatigney, Dominic DeCrescenzo, Venetta DeCrescenzo, Julie Finger, Connie Godinez, Joseph Godinez, Etty Goldsman, Leo Goldsman, Alfred Gonzales, Mary Larsen, Angeline Lauer, Robert J. Lauer, Jess R. Macias, Jeff Nabong, Josephine Nabong, Fred Naiditch, Sandra Naiditch, Carlos Pereyra, Adelina Rubidoux, Albert L. Rubidoux, Frank Ulrich, Rodrigo Recendez, Gregoary Munzo, Ferdinand E. DeJan, Jr., Gerald I. Lubin, William Joseph Kepp and Sara Lewis Rugg,

Intervenors.

Before: Hamlin, Circuit Judge, and East and Weigel, District Judges*

Weigel, J.

* Honorable Oliver D. Hamlin, Jr., Senior United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, and Stanley A. Weigel, United States District Judge for the Northern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On August 28, 1973, in the District Court for the Northern District of California, a three-judge District Court was convened pursuant to sections 2281 and 2284 of Title 28 of the United States Code. Jurisdiction is founded on sections 1331 and 1343(3) of Title 28.

The plaintiffs are United Americans for Public Schools, a nonprofit California corporation; Americans United for Separation of Church and State, a nonprofit District of Columbia corporation with members in California; and four individual residents and taxpayers of California. The defendants are the Franchise Tax Board of the State of California, the state agency authorized to execute the statutes at issue here; and 29 intervenors, all California residents and taxpayers with one or more children in nonpublic schools in California.

Plaintiffs assert that sections 17065-17067 of the California Revenue and Taxation Code, Stats. 1972, c. 1260, enacted in December, 1972, violate the Establishment Clause of the First Amendment. The provisions under attack provide for a reduction in state income tax for those taxpayers sending their children to nonpublic schools. Depending on the taxpayer's adjusted gross income, yearly tuition fees of up to $125 per child may be credited against the tax due. Parents with a combined annual income of less than $15,000 may take the maximum credit of $125 for each child sent to a nonpublic school. As income increases, the allowable tax credit progressively diminishes to zero for an adjusted gross income of $19,000 and over.

Legislative findings incorporated into § 17065 indicate that of the approximately 5,000,000 children attending

grades kindergarten through 12 in California, some 392,442 of them attend nonpublic schools. A substantial majority of these nonpublic school students attend Roman Catholic schools where religious instruction is part of the curriculum.

Plaintiffs seek to enjoin the execution of the tax credit plan by the Franchise Tax Board, and they also move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. While all inferences of fact must be drawn in favor of the party opposing such motion (*United States v. Diebold, Inc.*, 369 U.S. 654 (1962)), and the moving party has the burden of showing that he is entitled to judgment as a matter of law, the opposing party must show evidence that justifies a trial. (3 *Barron and Holtzoff* 149).

California's tax credit plan closely parallels a tax relief provision recently struck down by the Supreme Court. In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 789-94 (1973), the Court held that a tax benefit afforded by New York to parents sending their children to nonpublic schools offends the prohibition of the First Amendment against laws "respecting an establishment of religion." The tax benefits disputed here and before the Supreme Court in *Nyquist* produce the same impermissible result—state sponsorship of religious activity.

The California tax credit benefits only those taxpayers who send their children to sectarian schools. Therefore, the Establishment Clause is violated whether or not the tax savings eventually find their way into sectarian institutions. *Committee for Public Education and Religious Liberty v. Nyquist*, *supra* at 786.

On the assumption that the amount of the tax credit will find its way into sectarian schools, defendant and defendant-intervenors contend that the resultant aid to those schools would be used exclusively for secular purposes because the tax credit is wholly insufficient to meet the costs of secular services performed by sectarian schools. The holding in *Nyquist* invalidates the contention. A "statistical guarantee" that public funds will not be used to finance religious education does not satisfy the Establishment Clause. *Committee for Public Education and Religious Liberty v. Nyquist, supra* at 777-79, 787.

In sum, defendant and defendant-intervenors have raised no material issues of fact warranting trial; plaintiffs have shown that they are entitled to summary judgment as a matter of law.

For the foregoing reasons and other good cause, It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' motion for summary judgment is granted.

It Is Further Ordered, Adjudged and Decreed that the Franchise Tax Board of the State of California is permanently enjoined from executing the provisions of sections 17065-17067 of the California Revenue and Taxation Code, Stats. 1972, c. 1260.

Dated: February 1, 1974.

Judges

Before his death, Judge Hamlin concurred in the result reached in this case.

In the United States District Court
for the Northern District of California

No. C-73-0090 SAW

Original Filed—Feb 1 1974

Clerk, U. S. Dist. Court
San Francisco

United Americans for Public Schools, a corporation, Americans United for Separation of Church and State, a corporation, William F. Poynter, Chester Mac Phee, Henry Schindel, Mary Middleton,

Plaintiffs,

v.

Franchise Tax Board of the State of California,

Defendant,

Molly Bronstein, Sam Bronstein, Mark Chatigney, Dominic DeCrescenzo, Venetta DeCrescenzo, Julie Finger, Connie Godinez, Joseph Godinez, Etty Goldsman, Leo Goldsman, Alfred Gonzales, Mary Larsen, Angeline Lauer, Robert J. Lauer, Jess R. Macias, Jeff Nabong, Josephine Nabong, Fred Naiditch, Sandra Naiditch, Carlos Pereyra, Adelina Rubidoux, Albert L. Rubidoux, Frank Ulrich, Rodrigo Recendez, Gregoary Munzo, Ferdinand E. DeJan, Jr., Gerald I. Lubin, William Joseph Kepp and Sara Lewis Rugg,

Intervenors.

CORRECTIVE ORDER

Judge William G. East concurring, the Order Granting Plaintiffs' Motion For Summary Judgment heretofore filed herein is hereby, *nunc pro tunc,* corrected as follows:

1. At page 3, line 23, the word "only" is changed to the word "primarily".

2. At page 3, line 30, the word "Recognizing" is substituted for the words "On the assumption".

Dated: February 1, 1974.

Stanley A. Weigel
Judge

Appendix B

ASSEMBLY BILL No. 1724

Introduced by Assemblymen McCarthy, Vasconcellos, Campbell, Badham, Chacon, and Thomas
(Coauthors: Senators Moscone and Nejedly)
March 15, 1972

Referred to Committee on Revenue and Taxation

An act to repeal Chapter 2.5 (commencing with Section 17065) of Part 10 of Division 2 of, and to add Chapter 2.5 (commencing with Section 17065) to Part 10 of Division 2 of, the Revenue and Taxation Code, relating to tax credits under the Personal Income Tax Law, to take effect immediately, tax levy.

The people of the State of California do enact as follows:

SECTION 1. It is the purpose of this act to afford parents and guardians of children in grades kindergarten through 12 some state income tax relief when they, in exercising their right of educational choice for their children, relieve the state's taxpayers of the public costs of educating such children.

SEC. 2. (a) The Legislature finds that approximately 5,000,000 children attend grades kindergarten through 12 in California and that 392,442 of these youngsters attend nonpublic schools.

(b) Under Sections 17751 and 17801 of the Education Code, the minimum amount the state may provide for the support of these children in public schools is one hundred twenty-five dollars ($125) for each unit of average daily attendance, and the average combined state and local expenditure for each unit of average daily attendance for the

1972-73 fiscal year will exceed nine hundred dollars ($900). Moreover, recent judicial decisions, such as Serrano v. Priest (1971), 5 Cal. 3d 584, may place additional burdens on taxpayers for the support of the public schools in amounts which are presently not subject to calculation.

(c) Private support of nonpublic school students currently saves state and local taxpayers approximately three hundred fifty million dollars ($350,000,000) annually.

(d) Rising costs of education in nonpublic schools have forced many parents to withdraw their youngsters from private schools and to enroll them in public schools at public expense. During the past six years, some 65 nonpublic schools have closed. Nonpublic school enrollment has dropped by 60,000 students. During the 1972-73 fiscal year, the resultant increase in enrollment in public schools will require an expenditure of fifty-five million dollars ($55,000,000). The Legislature believes that it is in the best interest of the taxpayers of the state and school districts for nonpublic elementary and secondary schools to continue their operation since their closing imposes immediate burdens upon the state and public school districts to support the cost of education of children enrolled in such nonpublic schools in the public schools and would threaten the quality of education offered to children enrolled by their parents in the public schools.

(e) The problem of parental inability to afford desired nonpublic schooling is particularly acute in low-income urban centers where a majority of nonpublic schools are clustered.

(f) The Legislature believes that the public interest is best served through competition and diversity in educational opportunity offered by public and nonpublic schools, nonpublic schools complying with state standards as re-

quired by law fulfill a public purpose by serving the general welfare of the people of the state.

(g) Therefore, the Legislature declares that it serves the general welfare of the people of the state to grant some income tax relief to parents and guardians of youngsters enrolled in nonpublic elementary and secondary schools to defray part of the cost of such children's secular education.

SEC. 3. Chapter 2.5 (commencing with Section 17065) of Part 10 of Division 2 of the Revenue and Taxation Code is repealed.

SEC. 4. Chapter 2.5 (commencing with Section 17065) is added to Part 10 of Division 2 of the Revenue and Taxation Code, to read:

CHAPTER 2.5. CREDITS FOR EDUCATION COSTS

17065. As used in this chapter—

(a) "Nonpublic school" means a school described in Sections 12154 and 12154.5 of the Education Code providing instruction in any or all grades kindergarten through 12, if such school is not conducted for profit and complies with the provisions of Section 2000a and following of the United States Code (relating to the Civil Rights Act of 1964).

(b) "Education cost" means tuition and classroom instruction fees payable during the regular academic year when Sections 12154 and 12154.5 of the Education Code are applicable. *There is excluded from "education cost" any amounts paid to an individual with respect to the education of a dependent under the provisions of Chapter 8.2 (commencing with Section 6870) of Division 6 of the Education Code.*

17066. (a) An individual computing his tax under Section 17041 or 17048 shall be allowed a credit against the taxes imposed by this part in the amount of education cost paid to a nonpublic school during the taxable year for each

dependent (as defined in Section 17056), which shall be in addition to all other credits allowed under this part, except the credit provided in Section 18551.1 (relating to withholding credit) and the credit provided in Section 17061 (relating to excess tax credit).

(b) The credit allowed by subdivision (a), as it applies to each dependent, shall not exceed the amount of education cost paid to a nonpublic school during the taxable year or the amount set forth in this subdivision, whichever is less.

If adjusted gross income is:	The maximum tax credit is:
Less than $15,000	$125
15,000 but less than 16,000	100
16,000 but less than 17,000	75
17,000 but less than 18,000	50
18,000 but less than 19,000	25
19,000 and over	0

(c) If the husband and wife file separate returns, their combined adjusted gross income shall be taken into account in computing the amount of the credit pursuant to the schedule in subdivision (b).

17067. No credit shall be allowed under this chapter unless the return is accompanied by a receipt or receipts for each student signed by an official of such student's nonpublic school of enrollment showing the following information:

(a) The name and location of the nonpublic school in which the student is enrolled.

(b) The date or dates of payment and the amount paid for education costs.

(c) The grade or grades in which the student is enrolled during the period for which payment was made.

(d) The name of the student and the name of the individual paying the education costs.

SEC. 5. In repealing Chapter 2.5 (commencing with Section 17065) of Part 10 of Division 2 of the Revenue and Taxation Code by Section 3 of this act, the Legislature specifically directs attention to Section 17029 of such code, the provisions of which apply to such repeal.

SEC. 6. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 7. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, the provisions of Section 4 of this act shall apply in the computation of taxes for taxable years beginning after December 31, 1972.

FILED
JUN 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1718

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, MOLLY BRONSTEIN, and All Other Intervenors in this District Court,
Appellants,

vs.

UNITED AMERICANS FOR PUBLIC SCHOOLS, a Corporation, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a Corporation, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO AFFIRM ON BEHALF OF APPELLEE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a Corporation

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MOTION TO AFFIRM ON BEHALF OF APPELLEE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a Corporation

Pursuant to Rule 16 of the Rules of this Court, the appellee Americans United for Separation of Church and State moves to affirm the judgment of the court below on the grounds that the appeal presents no substantial question, the question upon which review is sought has been definitively answered by the decisions of this Court, and further review by this Court is not necessary.

Question Presented

The question presented on this appeal is whether the District Court erred in summarily granting the motion of the appellee to enjoin the enforcement of California's Tax Credit Law on the ground that it violated the Establishment Clause of the First Amendement to the United States Constitution.

Statute Involved

The California Tax Credit Law, Cal. Stats. 1973, c. 1260, California Revenue and Taxation Code §§17065-17067, is set forth in full in App. B of the Jurisdictional Statement, pp. 7-11.

Statement of the Case

On December 21, 1972 California enacted its Tax Credit Law designed to assist parents in the payment of tuition for their children at nonpublic schools. The law allowed a credit under the State's Personal Income Tax Law not to exceed $125 for each taxable year after December 21, 1972. The credit was scaled so that parents with adjusted gross incomes of $19,000 and over received no tax credit.

Plaintiffs, two corporations and four individuals, brought suit in the United States District Court, for judgment declaring the law unconstitutional under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth, and enjoining its enforcement. A three-judge court was duly convened and the plaintiffs moved for summary judgment. The Court,

finding no constitutional difference between the California statute and the New York tax credit law invalidated in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 93 S. Ct. 2955 (1973), granted the motion and issued the judgment appealed from herein.

Argument

This appeal rather surprisingly does not address itself to the merits of the controversy, namely the constitutionality of the challenged statute. There is hardly a claim in the Jurisdictional Statement that the statute is actually constitutional, but only that it should not have been summarily held unconstitutional. As the Jurisdictional Statement says (at p. 11), "[a]ll that the Franchise Tax Board and intervenors ask for is their right to have the constitutionality of the statute decided on the actual facts, not on suppositions about the nature of the nonpublic schools and their activities." What the appellants complain about in this appeal is the refusal of the District Court to order a full factual trial on the question of the facial unconstitutionality of the challenged law.

The District Court, in granting the appellees' motion for summary judgment, relied upon *Nyquist*. It could also have cited *Grit* v. *Wolman*, 93 S. Ct. 3062 (1973), affirming *Kosydar* v. *Wolman*, 353 F. Supp. 744; and *Seegers* v. *Traigle*, —— F. Supp. —— (U.S.D.C., M. D. La., decided Dec. 27, 1973), both of which invalidated tax credit laws constitutionally indistinguishable from the statutes involved in the present case and in *Nyquist*. In none of these cases was there a factual trial on the merits; in each the final judgment was issued summarily.

In *Nyquist,* reference was made to "the ingenious plans for channelling state aid to sectarian schools that periodically reach this Court." 93 S. Ct. at 2972. During the brief period since 1971, ten of these "plans" involving primary and secondary schools have reached this Court for decision: *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) (purchase-of-services financed out of horseracing proceeds); *Sanders* v. *Johnson,* 403 U. S. 955 (1971), affirming 319 F. Supp. 421 (purchase of services financed out of general treasury); *Earley* v. *DiCenso,* 403 U. S. 602 (1971) (salary supplements); *Nyquist* (tuition payments for low-income families); *Sloan* v. *Lemon,* 93 S. Ct. 2988 (tuition reimbursements); *Essex* v. *Wolman,* 93 S. Ct. 61 (1973), affirming 342 F. Supp. 399 (tuition grants); *Nyquist* (tax benefits); *Grit* v. *Wolman* (tax credits); *Nyquist* (maintenance and repair grants); *Levitt* v. *Committee for Public Education and Religious Liberty,* 93 S. Ct. 2814 (1973) (mandated services).

In every one of these instances the Court held the plan violative of the Establishment Clause, and with the exception of *DiCenso,* in each case *the determination was made without the benefit of a trial on the facts.*

The point of the matter is that a trial is required only where there are controverted issues of fact whose resolution is necessary for the determination of the legal issue facing the court. At the hearing on the motion for summary judgment in this case, the appellants herein were pressed to specify and identify these issues of facts, but found it difficult to do so. The closest the appellants came to specification and identification is to be found in the following colloquy between Judge Weigel and Mr. Louisell, attorney for the intervening defendants:

Mr. Louisell: * * * Your Honors will note in some of the cases Justice Powell wrote for the Court, in other cases the Chief Justice wrote for the Court, admitted in all candor, if parents are going to have the right to send their children to private schools, whether affiliated with religious organizations or not, the path that the Court has carved out for those parents is a very narrow channel between Scylla & Charybdis, as the Court itself has said, but there is a channel, and there is a channel, I respectfully submit, if you would keep open to a full and fair hearing on the exact questions involved which would call for a denial of the pending motion for summary judgment.

Your Honors will note in how many of these cases the proceeding was simply summary judgment without a chance to show facts.

Judge Weigel: Well, Mr. Louisell, give us the facts that you believe you could prove at a trial which would take you down that narrow passage.

Mr. Louisell: In the complaint there is alleged that about 90 percent of the children in California who are in non-public schools are in Catholic schools. That is not the fact. The fact is that about 45 percent of the non-public schools of California are Catholic schools, only about 45 or 46 percent, and that the number of children in all the non-public schools in California who are in Catholic-related schools probably does not exceed 69 percent, and the exact facts could be demonstrated at trial (Reporter's Transcript. August 28, 1973, pp. 12-13).

• • •

Judge Weigel: I would like to know where your first point takes you. Suppose it is true that only 45 percent of the private schools are Catholic schools, and suppose it is true that of the total student population of the private schools only 69 percent are Catholic. What does that establish?

Mr. Louisell: It establishes this, Your Honor, that in some of these opinions there is language that the real evil of the situation is that this has become a matter of preference for one religious denomination. We maintain that that is not the case, at least in California. We maintain that in California—

Judge Weigel: I suppose your argument might be, just looking at that, if the percentage were 51 percent of the total number of schools, it might be otherwise?

Mr. Louisell: It would be difficult to crystallize, and I think that is one of the dangers in this area, we can get to extreme crystallization and rigidity.

But if we could show the facts, whether it is 45 or 35 or 55, whatever it be, it is not something that the legislature has been induced to do as a preference for the Catholic parents.

Judge Weigel: The next thing, have you finished that thought?

Mr. Louisell: I think so, Your Honor.

Judge Weigel: The next thing that you urge upon us that there ought to be a trial, so that it can be shown, based upon testimony from one or more members of the Council—

Mr. Louisell: Yes, Your Honor.

Judge Weigel: —of private schools, people interested in private schools, they can testify that the private school situation does not promote intolerance for divisiveness.

Mr. Louisell: Or division along religious lines.

Judge Weigel: That is your second point?

Mr. Louisell: That is right. (*Ibid.*, pp. 15-16)

We have set forth this colloquy because it presents more specificity than is to be found in the Jurisdictional Statement. What the appellants assert is that while the complaint alleged that 90% of the pupils in California's nonpublic schools are Catholic a trial would show that the true

figure is only 69%, and that while the complaint asserts that aid to sectarian schools causes religious and political divisiveness, a trial would show that no such consequences ensured from the enactment of the challenged law.

In respect to the first assertion, we suggest that nothing in *Nyquist* (or in any other of the decisions invalidating "plans for channelling state aid to sectarian schools") indicates that the difference between 90% and 69% is of constitutional significance. On the contrary, as we will indicate further below, the Court in *Nyquist* specifically rejected "statistical judgment[s]" in determining the constitutional issue.

Nor does religio-political divisiveness give rise to a triable factual issue. This consequence of state aid to religion was first suggested in *Walz* v. *Tax Commission*, 397 U. S. 690, 695 (1970), was expanded in *Lemon* v. *Kurtzman*, 403 U. S. at 622-624, and further expanded in *Nyquist*, 93 S. Ct. at 2977-78. In no case did the Court predicate its assertion on a trial record showing divisiveness in respect to a specific legislative measure at a particular point in time; in each instance the context clearly shows that the Court was speaking of the probable if not inevitable consequences of such legislation in general.[1] That the Court

1. In his concurring opinion in *McCollum* v. *Board of Education*, 333 U.S. 203, 228 n. 19, Mr. Justice Frankfurter, speaking of the movement for released time for religious education in the public schools, said:

> The divergent views expressed in the briefs submitted here on behalf of religious organizations, as amici curiae, in themselves suggest that the movement has been a divisive and not an irenic influence in the community.

The multiplicity and divergence of briefs *amici curiae* submitted in numerous aid to sectarian schools cases indicate that his observation is no less valid in respect to this type of governmental involvement in religious affairs.

did not intend to exempt income tax credit legislation from this generalization is shown by its reference in *Nyquist* to the predictability of "the pressure for frequent enlargement of the relief" and the consequent "potential for political divisiveness related to religious belief." 93 S. Ct. at 2977.

The only other factual issue asserted in the Jurisdictional Statement to require a plenary trial arises from the relation of the amount of the tax credits to the cost of secular instruction in the religious schools and the amounts expended by the State for such instruction in the public schools. Under the statute the maximum tax credit allowable is $125 per pupil per year, and the defendants submitted affidavits on the motion for summary judgment, and would prove on trial, if one were ordered, "that the educational costs attributable to secular education as prescribed by the State Education Code, exceed $125 per pupil per year." Jurisdictional Statement, p. 7.

The difficulty with this is that the same claim was asserted in *Nyquist*, was fully considered by the Court there and ruled constitutionally irrelevant. The Court said:

> Second, the Majority Leader and President pro tem of the State Senate argues that it is significant that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious schools' total expenses. The New York statute limits reimbursement to 50% of any parents' actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contributions, endowments and the like." On the basis of these two statistics, appellee reasons that the "maximum tuition reimburse-

> ment by the State is thus only 15% of the educational costs in the nonpublic schools." And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." *It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, and it can fare no better here.* Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement." 93 S. Ct. at 2972-73. Footnotes omitted. (Emphasis added.)

While this statement was made in respect to tuition grants, the Court held that there was no constitutional difference between these and tax credits. *Ibid.*, p. 2974. Moreover, the italicized sentence in the above paragraph from *Nyquist* disposes of the contention in the Jurisdictional Statement (p. 12 footnote) that a relationship between costs for public and nonpublic schools is constitutionally irrelevant only where a direct subsidy to sectarian schools is involved but is constitutionally critical where the subsidy is indirect as in the case of tax credits.

Appellants claim that they "should be allowed to show that the language of *Nyquist* invoked by the court below, 'a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education,' is not applicable to the facts here." They do not, however, indicate what facts elicited on a trial would make

that showing. The *Nyquist* decision, and the others cited herein, show that there are no such facts and that a plenary trial would serve no purpose other than delay.

The crux of the matter is that the California statute herein challenged is not constitutionally distinguishable from the New York law invalidated in *Nyquist*.[2] This is hardly surprising; the California statute was enacted before *Nyquist* was decided by this Court. The New York law came to California with the cloak of protection accorded by the decision of the District Court for the Southern District of New York upholding its validity. 350 F. Supp. 655. There was, therefore, no need to fashion another of "the ingenious plans for channelling state aid to sectarian schools that periodically reach this Court." Appellants' efforts in the court below and on this appeal are a *post hoc* attempt to achieve the impossible, namely, distinguish the indistinguishable.[3]

---

2. *Cf. Seegers* v. *Traigle, supra*:

> The Collector of Revenue has stated to the court that he has examined the *Nyquist* decision with care, has compared the language and effect of the New York State Tax Credit Law with the Louisiana Tax Credit Law here at issue. With commendable candor, he states that there is no constitutionally significant difference between the New York and Louisiana statutes insofar as their substance and intent are concerned. This is correct; therefore we can neither narrowly distinguish nor subvert *Nyquist*.

Slip opinion, p. 2.

3. Appellants note that one of the judges of the three-judge court died during the pendency of the case, and calls this Court's attention to *Ayrshire Corp.* v. *United States*, 331 U. S. 132 (1947), holding that a judgment of a three-judge court based upon a determination by only two judges is void. Jurisdictional Statement, p. 13, footnote. In that case, however, the judge became ill and did not participate in its determination. 331 U. S. at 134. In the present case Judge Hamlin, before his death, concurred in the result reached by the Court. Jurisdictional Statement, Appendix, p. 4. Unlike *Ayrshire*, there was a determination here by all three judges. A similar situation existed in *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545, 548 (1972).

Conclusion

For the reasons set forth herein the judgment of the District Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm or Dismiss

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Motion to Affirm or Dismiss

Pursuant to Rule 16, of the Rules of this Court, the appellees move to dismiss the appeal herein, or, in the alternative, move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so insubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether, in light of *Committee for Public Education and Religious Liberty v. Nyquist*, 392 U.S. 236, appellants pose any question of substance warranting further argument in this Court.

STATEMENT OF THE CASE

This is a direct appeal from a summary judgment of a statutory three-judge District Court entered February 1, 1974, which permanently enjoined appellant Franchise Tax Board of the State of California from executing the provisions of Sections 17065-17067 of the California Revenue and Taxation Code, Stats. 1972, c. 1260, as being violative of the Establishment Clause of the First Amendment to the United States Constitution. The statute is set forth in Appendix B of appellants' Jurisdictional Statement and granted tax credits to parents of non-public school children. As appellees contend and the Court below decided, the statute is similar in all material respects to part of the New York statute struck down by this Court in Nyquist.

Appellees commenced this litigation on January 16, 1973, by their complaint praying for restraining order, preliminary and permanent injunctions. For the purpose of meeting legal requirements for such equitable relief, the complaint is verified and contains what may perhaps be some evidentiary matter. Appellant Franchise Tax Board filed its answer thereto on or about February 2, 1973. Said answer is unverified and consists mainly of denials. On July 6, 1973, appellees moved the Court for a preliminary injunction, coupling the motion with the affidavit of Henry C. Clausen, Jr., and citing the recently decided *Nyquist* case, *supra*. The affidavit, which appellants characterize as pure hearsay, contains the then latest statistics promulgated by the State Superintendent of Public Education respecting the number of students enrolled in non-public elementary and high schools which were church-related. Said statistics are required to be kept by California law. It also quotes by way of admission or declaration against interest statements made by authoritative sources concerning the religious purpose, make-up, and curricula of church-related schools. This affidavit remains uncontro-

verted by any counter-affidavit or offer of proof. No objection thereto was made in the District Court. Nor was it subject to any motion to strike. On July 11, 1973 appellees filed their motion for summary judgment, based upon the same case and affidavit. Both motions were set to be heard on August 28, 1973.

On or about August 24, 1973, appellant-intervenors filed their motion to intervene, together with their proposed answer, again unverified, and, on or about August 24, 1973, appellant Franchise Tax Board filed several affidavits, all to the effect that it costs more than $125.00 per year to teach secular subjects in the affiants' respective private schools. (The tax maximum credit allowed under the Statute is $125.00.)

Neither appellant State nor Intervenors filed any motions to strike or make more certain the allegations of the complaint.

Hearing was held on the motions on August 28, 1973. By stipulation of all parties, the Court granted a preliminary injunction on August 31, 1973. There is of course no appeal therefrom.

At the hearing, counsel for intervenor-appellants raised objection to the allegation in the complaint to the effect that of the numbers of non-public school students found under Section 2(a) of the statute some 90% attend Roman Catholic schools. He offered to prove among other things, that the percentage was only 69%.

The case was argued extensively, and by permission of the Court, appellant-intervenors were permitted to file a brief, which they did on or about September 4, 1973. Appellees responded on or about September 10, 1973 with their own brief, consisting of 11 pages and citing and discussing some 10 Supreme Court authorities. (Cf. appellant's statement on page 9 of the Jurisdictional Statement that

the motion for summary judgment was "accompanied" only by citation of the *Nyquist* case.)

On December 28, 1973 Justice Hamlin died, but the opinion signed by the remaining two judges states that, "Before his death, Judge Hamlin, Jr. concurred in the result reached in this case." (Appellants seem to argue obliquely by way of footnote that such fact makes the judgment void, citing *Ayrshire Corp. v. U.S.*, 331 U.S. 132—page 13 of the Jurisdictional Statement. However, in view of the extensive argument, oral and written, "heard" by him and the statement by the Court that Judge Hamlin had already "determined" the outcome of the case prior to his death by concurring in the result, that case is therefore inappropriate, and we suspect appellants do not seriously argue the point.)

The opinion of the Court indicates that the *Nyquist* case was decisive, despite the affidavits submitted by appellant State board. The effect of these, contrary to appellants' assertion in their Jurisdictional Statement, is expressly referred to therein.

ARGUMENT

THERE IS NO QUESTION OF SUBSTANCE

If ever a case cried out for affirmance without argument, this is the case! California's statutory scheme to afford tax relief to parents of students attending church-related schools is practically identical to part of New York's statutory scheme held invalid only recently by the Court in the *Nyquist* case, *supra*. Whatever distinctions appellants perceive between the two statutes are at the most distinctions without a difference. And whatever substantive arguments appellants raise have already been laid to rest by the Court in its *Nyquist* holdings.

Appellants seem to argue two things. First, they condemn the complaint as being inartfully drawn and consisting of conclusions and evidentiary facts. No case is

cited to substantiate this claim, and it should be sufficient answer to say that appellants made no motions to strike or to make more definite the allegations thereof. Furthermore, to the extent that evidentiary facts are therein verified, they constitute further ground for affirmance.

Second, appellants condemn use of the summary judgment procedure. Appellees, on the other hand, contend that such procedure in this case was most appropriate!

Rule 56 provides that summary judgment should be granted if the pleadings and affidavits "show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law". (Emphasis added).

In light of said rule consider the factual posture of the case at the hearing on motion for summary judgment. The statute finds in Sec. 2(a) that out of approximately 5,000,000 children attending grades kindergarten through 12 in California, 392,442 attend nonpublic schools. This finding is not denied. Appellees' verified complaint alleges that as of October 1, 1971 the latter figure was 409,421, of which 351,425 attended religious related schools, and "some" 90% of the latter attended schools affiliated with the Roman Catholic Church. Appellees' affidavit, citing later statistics, has somewhat different figures. None of these statistics is controverted by affidavit or verified denial, except that appellant-intervenors offered to prove that at present the 90% figure should be 69%. Thus the District Court properly found the *material* fact that the California tax credit benefits primarily those taxpayers who send their children to sectarian schools. The offer of proof, and the various statistics present nothing more than distinctions without a difference.

Appellants also argue that there was a genuine issue of fact respecting the religious purpose, make-up, and cur-

ricula of the sectarian schools so benefited, all as alleged in appellees' verified complaint (such as Paragraph 9 thereof), because these allegations are denied in appellants' unverified answers. But the factual posture of the case at the hearing belies this argument, and indeed it would be preposterous to suppose otherwise—(as this Court stated in *Early v. Di Censo*, 403 U.S. 602, ". . . parochial schools involve substantial religious activity and purpose.") How could appellants prove the contrary of the proposition as alleged in said paragraph 9 that the sectarian schools benefited by the California tax credit *could* be ones that:

> "(a) impose religious restrictions on admission; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach"?

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 767-768.

In any event, appellants' unsworn denials, by the express terms of Rule 56(e), do not create genuineness of this purported issue. But, on the other hand, appellees' verified complaint may well be treated as an affidavit in support of their motion for summary judgment. *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 Fed. (2d) 150 (C.A. Ga. 1965); *Fletcher v. Norfolk Newspapers, Inc.*, 239 Fed (2d) 169 (C.A. Va. 1956). Thus, for the purpose of the motion for summary judgment, appellees' allegations respecting the religious purpose, make-up, and curricula of the sectarian schools stand uncontroverted.

Moreover, those allegations are corroborated by appellees' uncontroverted affidavit filed in support of the motion. Contrary to appellants' statement that appellees attempted no showing, and that appellees' affidavit was "of no legal value in support of the motion" be it noted again that appellants neither objected to said affidavit nor moved to strike it. The District Court was therefore quite justified in considering said affidavit in ruling on the motion for summary judgment. *Klingman v. National Indemnity Co.*, 317 Fed. (2d) 850 (C.A. 7th, 1963).

The *only* evidence presented by appellants at the hearing on the motion were the State agency's affidavits to the effect that it costs more than $125.00 per year to teach secular subjects in sectarian schools. From this fact, which we concede to be true but of no material value, together with some difference in wording between the California and New York statutes, appellants attempt to find some distinction from the *Nyquist* case. They miss the point.

This Court held that:

> "INSOFAR AS SUCH BENEFITS RENDER ASSISTANCE TO PARENTS WHO SEND THEIR CHILDREN TO SECTARIAN SCHOOLS, THEIR PURPOSE AND INEVITABLE EFFECT ARE TO AID AND ADVANCE THOSE RELIGIOUS INSTITUTIONS."
> (*Nyquist*, 473 U.S. at 793)

Such is the undisputable fact here.

This being so, what difference does it make how much the taxpayer actually paid for nonpublic school tuition? Appellants fail to show any significance in this purported distinction between the California and New York statutes. And, what difference does it make whether or not the New York tax credit bore a relation to the cost of public education? In any case, as the Court held, "the money involved represents a charge made upon the state for the purpose

of religious education." (*Nyquist*, 473 U.S. at 791) And, finally, what materiality do appellants' affidavits have? This Court has already disposed of the possible argument that the $125.00 tax credit figure would statistically assure that any benefit would be for secular purposes.

> "Obviously, if [this argument were] accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement'."
> (*Nyquist*, 413 U.S. at 787-788)

Interestingly enough, appellants find no fault with the holding of the Court in the *Nyquist* case. It therefore becomes unnecessary to rehash all the many and good reasons supporting that decision. Appellants, however, do caution on page 12 of their Jurisdictional Statement that the tax credit parts of the New York statute should be distinguished from its other parts, as though therein lies some secret and obscure difference in effect. But the Court has already called to a halt this "legal minuet".

> "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under Sec. 2. The qualifying parent under either program receives the same form of encouragement, and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that 'in both instances the money involved represents

> a charge made upon the state for the purpose of religious education.' 350 F. Supp., at 675."
> (*Nyquist*, 413 U.S. at 790-791).

Finally, let it be said, contrary to appellants' argument and purported authorities, there was no abuse of summary judgment here. It was neither dangerous nor invalid, nor do any of those purported authorities so hold. On the contrary, summary judgment has been established as an especially warranted procedure on First Amendment violations involving church-schools. Thus in the *Nyquist* case itself no record was developed. In *Board of Education v. Allen*, 413 U.S. 756, the case came up on pleadings. And in *Sloan v. Lemon*, 413 U.S. 825, decided the same day as *Nyquist*, summary judgment was affirmed.

Furthermore, none of the cases cited by appellants on page 10 of their Jurisdictional Statement purports to support their contention that summary judgment was inappropriate on this "delicate" constitutional question. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, deals with a market valuation under gas leases. *United States v. Diebold*, 369 U.S. 654 deals with anti-trust and conflicting inferences from controverting affidavits and exhibits. *Adickes v. Kress & Co.*, 398 U.S. 144, dealt with refusal to serve food because of racial discrimination. *Tilton v. Richardson*, 403 U.S. 672 has nothing to do with summary judgment. Furthermore, the attempt of appellants to invoke their right of Free Exercise as a reason for finding summary judgment inappropriate, as argued on page 12 of the Jurisdictional Statement, is itself answered by *Nyquist* holding this argument also specious:

> "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits

render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." (*Nyquist*, 413 U.S. at 793)

CONCLUSION

We submit that appellants have shown no substantial question warranting further argument in this Court. They have failed to show any genuine issue as to any material fact and therefore the summary judgment should be affirmed on motion.

Why burden this Court, already confronted with overlarge caseload, with time-wasting argument, when the Court has spoken on the precise point. The record of the Court contemplates this kind of termination for this type of case and with good reason. There must be finality with respect to similar facts and law so that the courts may attend to cases properly clamoring for attention.

Respectfully submitted,

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